No. 20904

United States Court of Appeals

FOR THE NINTH CIRCUIT

DRAGOR SHIPPING CORPORATION, a corporation formerly Ward Industries Corporation,

Appellant,

vs.

UNION TANK CAR COMPANY, a corporation,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

OPENING BRIEF OF APPELLANT, DRAGOR SHIPPING CORPORATION

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The defendant-appellant, Dragor Shipping Corporation, formerly known as Ward Industries Corporation, (and hereinafter designated as "Dragor") appeals from a judgment entered against it on December 7, 1965 by the United States District Court for the District of Arizona, Tucson Division, in favor of the plaintiff-respondent, Union Tank Car Company, (hereinafter designated as "Union"), dismissing for want of prosecution the compulsory counterclaim contained in the answer which Ward had been compelled to file in the within action. Under Rule 41(b) of the Federal Rules of Civil Procedure, the judgment of dismissal is a judgment on the merits.

Jurisdictional Statement

Jurisdiction of the appeal exists under and by virtue of Sections 1291 and 2107, Judicial Code, Title 28, U. S. C. The jurisdiction of the District Court over the person of Dragor was continuously challenged and contested in the Court below.

On April 7, 1966, this Court unanimously held, upon the first appeal herein, (No. 20416), that the Arizona District Court never acquired any jurisdiction over the person of Dragor in this case. Its comprehensive opinion is reported in 361 Fed. (2d) 43.[1]

Statement of the Case

The within action was purportedly commenced on December 23, 1964 by the plaintiff, a New Jersey corporation, with its principal office in the State of Illinois, against the defendant, a Delaware corporation, with its principal office in the State of New York. Service of process upon Dragor was sought to be effected by service upon the Arizona Corporation Commission and the C. T. Corporation, Dragor's former statutory agent in the State of Arizona, ostensibly under the terms and provisions of Sec. 10-481 (a) (2) of the Arizona Corporation Statutes (R. 1, pp. 12-14). No process was ever served personally upon Dragor within the territorial confines of the State of Arizona.

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[1] The Record on Appeal herein includes the Record upon the prior appeal, No. 20416, which will be designated in the page references of this brief as R. 1, as well as additional documents and matter which will be designated in page references as R. 2. (Appellant's Designation of Record on Appeal, R. 2, pp. 222-224, and Clerk's Certificate to Record on Appeal, R. 2, pp. 234-235).

Dragor appeared specially to quash, vacate and annul the service of process and contest the jurisdiction of the Arizona District Court over its person (R. 1, pp. 15-16). Its motion to quash the service of process and dismiss the complaint was denied by the Arizona District Court on February 2, 1965, without opinion (R. 1, p. 182). Subsequently, after all of its efforts to procure an interlocutory review of that decision had failed, efforts which were bitterly resisted by the plaintiff herein, Dragor was forced to file its answer which set forth, among other things, a compulsory counterclaim based upon Union's breach of the New York settlement agreement and covenant not to sue executed by and between the parties hereto. The denial of Dragor's efforts, more fully described below, to procure an interlocutory review of the District Court's refusal to quash the service of process was predicated upon the argument advanced by Union that the filing of an answer and compulsory counterclaim could not possibly constitute a waiver of Dragor's *in personam* jurisdictional objections or confer any *in personam* jurisdiction upon the District Court which it otherwise would not possess.

In its answer and compulsory counterclaim, Dragor reasserted, among other things, its constitutional objections to the jurisdiction of the District Court and its disavowal of any intent to waive those objections. Thereafter, Union moved for a judgment on the complaint and, also, for a dismissal of the compulsory counterclaim as insufficient in law (R. 1, pp. 117; 110). Although the Arizona District Court denied the plaintiff's motion to strike the compulsory counterclaim as insufficient in law, it granted the plaintiff's motion for judgment on the complaint (R. 1, p. 184). A judgment in favor of Union against Dragor for the sum of $1,037,500. was entered by the District Court on June 1, 1965 (R. 1, p. 151).

Subsequent to the entry of the aforementioned judgment, Dragor moved for leave to discontinue its compulsory counterclaim without prejudice, urging as one of the grounds therefor that the *in personam* jurisdiction of the District Court was the subject of a pending appeal to this Court, and that, were Dragor successful, "all of the proceedings in this Court will be nullified *ab initio*" (R. 2, p. 149). Dragor's reassertion of its constitutional objections to the jurisdiction of the District Court was characterized by Union as "unseemly" (R. 2, p. 177). Upon the argument of Dragor's motion which the District Court denied (R. 2, p. 232), it announced that, regardless of this Court's disposition of the pending appeal, it intended to proceed with a trial of the compulsory counterclaim. (Dragor's Reply Brief, appeal #20416, pp. 18-19). Dragor thereupon refused to participate in the trial scheduled by the Court for December 7, 1965 (R. 2, pp. 204-206).

Before Dragor's appeal from the judgment of $1,037,500. could be heard by this Court, the District Court entered a second judgment on December 7, 1965 dismissing Dragor's compulsory counterclaim for lack of prosecution (R. 2, p. 207). The present appeal is the appeal taken by Dragor from the District Court's second judgment of December 7, 1965 dismissing Dragor's compulsory counterclaim for want of prosecution (R. 2, p. 208). Under Rule 41(b) of the Federal Rules of Civil Procedure, such a dismissal is a dismissal upon the merits.

Dragor's appeal from the judgment of $1,037,500. was heard by this Court in March of 1966. On April 7, 1966, this Court reversed that judgment as a nullity, quashed and vacated the service of process in this action, and dismissed Union's complaint upon the ground that the Arizona District Court never acquired jurisdiction over the person of Dragor in this action.

In its learned and dispositive opinion, 361 Fed. (2d) 43, this Court ruled that the causes of action set forth in Union's complaint "pertain only to the settlement agreement and note executed and delivered in New York" (p. 49); that Union's suit was "exclusively predicated upon claims arising in New York" (p. 49); and that New York was the place "where this cause of action arose" (p. 49). It thereupon concluded (p. 49):

> "The result which we reach here places no hardship upon Union, but protects Dragor from the hardship of being hauled across the country to defend itself in a suit exclusively predicated upon claims arising in New York. Union is a New Jersey corporation and has its principal place of business in Illinois. Nothing in this record suggests how it will be prejudiced by suing Dragor in Delaware, where it was incorporated, or New York, where it has its principal place of business and where this cause of action arose. Arizona has no interest in providing Union with a forum for such an action."

In sustaining Dragor's contention upon the prior appeal "that the Arizona District Court's assumption of jurisdiction over the person of Dragor and thereby over the subject matter of this action deprived Dragor of due process, and is, therefore, unconstitutional" (p. 45), this Court's decision of April 7, 1966 irrefutably established the District Court's constitutional inability to enter a valid judgment in this case. That decision is binding and conclusive upon the parties hereto, and automatically vitiates the second judgment of the District Court which is the subject of the within appeal.

Notwithstanding the fact that the judgment of the District Court dismissing Dragor's compulsory counterclaim

in this cause on December 7, 1965 is a nullity, it cannot be ignored by Dragor. Under existing law, a judgment entered by a District Court after it has improperly overruled an objection to the *in personam* jurisdiction of the Court can only be annulled upon a direct appeal therefrom to the appropriate appellate tribunal. Such a judgment, though void, cannot be collaterally attacked in any other proceeding or in any other jurisdiction. Consequently, to avoid any possible prejudice to Dragor in the future, it is compelled to seek, by this appeal, a corrective decree of this Court expunging the void judgment of the District Court herein.

The Issues Presented by This Appeal

This appeal presents for this Court's review the validity of the second judgment entered by the Arizona District Court in this case on December 7, 1965 dismissing the compulsory counterclaim contained in the answer which Dragor had been compelled to file after the District Court had erroneously denied its motion to quash the service of process and dismiss the complaint. Since this Court has already ruled by its judgment of reversal on April 7, 1966 that the District Court did not possess, never acquired, and could not constitutionally exercise any jurisdiction over the person of Dragor, it is plain that the judgment entered by the District Court on December 7, 1965 was totally void and must be annulled.

To apprehend the factual and legal scope of the issues posed by this appeal, we turn to a review of the proceedings before the Court below.

1. *The District Court's Erroneous Assumption of Jurisdiction In Personam*

The facts which established the Arizona District Court's unconstitutional assumption of jurisdiction *in personam* in this case, commencing with its erroneous refusal on February 2, 1965 to grant Dragor's motion to quash the service of process and dismiss the complaint, have been so fully set forth by this Court in its opinion of April 7, 1966 that no repetition thereof is necessary at this point. We shall limit our discussion of the facts to the manner in which the District Court continued to perpetuate its initial error which ultimately resulted in the entry of the void judgment of December 7, 1965 presented for review herein.

2. *Dragor's Continuous and Unsuccessful Efforts (a) to Procure a Review, by Interlocutory Appeal, of the District Court's Unconstitutional Assumption of Jurisdiction and (b) Avoid the Necessity of Filing an Answer Containing a Compulsory Counterclaim*

Subsequent to the District Court's denial of its motion to quash for lack of jurisdiction, Dragor moved promptly to modify the order denying the motion to vacate by adding recitals thereto which would have permitted an interlocutory appeal to this Court pursuant to 28 U. S. C. §1292(b).[2]

As appears from the affidavit of Dragor's president submitted in support of the application, Dragor was apprehensive that its jurisdictional objections might be jeopardized by being compelled to file an answer to the complaint which would have to include, under Rule 13, F.R.C.P., a compulsory counterclaim against Union for the damages which it had sustained as a result of Union's breach of its

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[2] This fact was noted by this Court in its opinion upon the prior appeal at 361 Fed. (2d), p. 45.

fiduciary obligations under the New York settlement agreement and covenant not to sue. The grounds for the motion to modify were explicitly stated by Dragor's president in his supporting affidavit as follows (R. 1, pp. 89-90):

> "Consequently, Ward has no other recourse than to assert the total damages which it has sustained by virtue of Union's breach of its fiduciary obligations, as a compulsory counterclaim in this case.
>
> It is precisely this situation which makes necessary the certification requested by Ward upon this motion.
>
> * * * * *
>
> Under Rule 13(a), Ward will be compelled, if the action continues in this Court, to file its counterclaim as a compulsory counterclaim. If it does not do so, that counterclaim may be deemed forever waived. *If such a counterclaim is filed, I am advised by counsel that the interposition thereof, even though it be a compulsory counterclaim, may automatically constitute a waiver of any objections to the jurisdiction of this Court over the person of the defendant which may be set forth in the answer or which may have been taken previously by motion.* If, therefore, Ward's jurisdictional objections are deemed waived by the interposition of a compulsory counterclaim which Ward would be compelled to assert, it would, therefore, become impossible to present those jurisdictional objections to the Circuit Court of Appeals after a final judgment in this case. Thus, the final judgment in this case would operate to deprive Ward of its right to review and give it no opportunity to appeal from the order denying its motion to quash.
>
> Ward's only remedy, obviously, is the present motion requesting the Court to certify the question to the Circuit Court of Appeals at this time in order that it may

> have what every litigant is entitled to receive, a right of review of a serious jurisdictional and constitutional issue which it would otherwise be compelled to waive." (Italics ours.)

Dragor's motion to amend the order of the District Court to permit an application to this Court for leave to appeal therefrom was vehemently opposed by Union as "frivolous" (R. 1, p. 76), although it conceded that a "reversal of the court's order sustaining the service of process would terminate litigation . . ." (R. 1, p. 76). Before the District Court, *Union insisted that Dragor's involuntary interposition of a compulsory counterclaim could not possibly constitute a waiver of its jurisdictional objections.* The District Court apparently accepted Union's arguments upon this score and denied Dragor's motion to amend its order on March 1, 1965, thereby shutting off any possibility of an application to this Court under 28 U. S. C. §1292(b).[3]

Still apprehensive, Dragor filed an application for a writ of prohibition in this Court. In that application, it reiterated its concern that the interposition of a compulsory counterclaim in its answer, though involuntary, might be deemed a waiver of its jurisdictional objections. It sought a prompt determination of those objections "without risk of waiver by petitioner-defendant, and with judicial economy." Its views were expressed in its Statement of Points and Authorities (pp. 11-12) as follows:

> "Petitioner-defendant believes that it has valid grounds to recover damages from respondent-plaintiff for breaches by respondent-plaintiff of fiduciary duties and obligations owed to petitioner-defendant. Peti-

[3] The District Court's denial of the motion to modify its prior order was noted by this Court in its opinion upon the prior appeal at 361 Fed. (2d), p. 45.

tioner-defendant's claims arise under said Agreement Of Settlement, and must be asserted by compulsory counterclaim in said action, under the requirements of *Rule 13 (a) Federal Rules of Civil Procedure.*

Hancock Oil Co. v. *Universal Oil Products Co.* 115 F. 2d 45 (9 Cir. 1940).

* * * * *

Under the circumstances, petitioner-defendant should not be required to incur the risk that the filing of its counterclaim would estop and preclude petitioner from preserving and raising its jurisdictional objections by appeal, or otherwise, after final judgment. Such jurisdictional objections can properly and promptly be determined at this time, without risk of waiver by petitioner-defendant, and with judicial economy." (Italics ours)

In opposing the petition, Union derided Dragor's fears. At page 3 of its Statement of Points and Authorities submitted to this Court in opposition to Dragor's motion for leave to file a writ of prohibition, it phrased the issue presented by the motion as follows:

"3. Whether the drastic and extraordinary remedy of prohibition or mandamus may be invoked in order to secure an advisory opinion from this Court that the pleading of a proposed compulsory counterclaim will not constitute a waiver of petitioner's personal jurisdiction objection—*a question with respect to which there is no conflict of authority.*" (Italics ours.)

Union formally assured this Court, in the most absolute of terms, that the waiver which Dragor feared could not possibly be effected by the filing of a compulsory counterclaim, *particularly where as here, Dragor was being "co-*

erced" into the service of its answer. Thus, Union argued in its Point III as follows:

"Petitioner's Erroneous Compulsory Counterclaim Contention Constitutes No Special Circumstance Warranting Allowance of the Present Motion

Dragor would invoke the extraordinary remedy jurisdiction of this Court in order to secure an advisory opinion whether its pleading of a proposed counterclaim in this action would constitute a waiver of its personal jurisdiction objection so as to preclude orderly review thereof pursuant to 28 U. S. C. §1291. A supposed ambiguity in the law in this regard is asserted as a special circumstance warranting immediate consideration of the question by way of prohibition or mandamus petition.

No such ambiguity exists *for the authorities hold without exception that the pleading of a compulsory, as distinguished from a permissive, counterclaim constitutes no waiver of a previously asserted jurisdictional defense.*

A careful analysis of this very question is found in Barron & Holtzoff, Federal Practice and Procedure, Vol. 1A, §370.2, where it is stated, at p. 535:

'What has been said so far deals only with the situation in which the counterclaim is permissive, and where there is some justice in saying that defendant, by voluntarily invoking the jurisdiction of the court on his counterclaim, must be held to have waived his objections to jurisdiction or venue. To apply such reasoning to compulsory counterclaims would be quite a different matter, *since there defendant has no choice but is coerced into asserting his claim as a counterclaim* . . . Thus there is merit in those cases

which have drawn a distinction, and which have held that the assertion of a compulsory counterclaim is not a waiver of other defenses and objections joined with it.'

The Tenth Circuit quoted and approved the conclusion stated in the *Barron & Holtzoff* treatise in *Hasse* v. *American Photograph Corporation,* 299 F. 2d 666 (C. A. 10, 1962). In a square holding on the point here in question the court declared at p. 668-9:

'. . . To hold that the defense of lack of jurisdiction of the person is waived by asserting a compulsory counterclaim would do violence to the purpose of Rule 12 in negativing the necessity of special appearances.

'Since appellant had no alternative but to submit his claim against the plaintiff along with his defense to appellee's complaint, *we hold that such compulsion did not constitute a waiver of his jurisdictional defense.*'" (Italics ours)

Apparently persuaded by Union's arguments, this Court denied the application for leave to file a petition for a writ of prohibition on March 22, 1965.[4]

3. *Dragor's Answer and Compulsory Counterclaim*

Having exhausted every possible method available under the law of procuring an interlocutory review of the District Court's erroneous jurisdictional ruling, Dragor was compelled to file its answer and compulsory counterclaim, under penalty of default or loss if it did not do so. In its answer, Dragor, still concerned, reasserted as its second

[4] This fact was noted by this Court in its opinion upon the prior appeal at 361 Fed. (2d), p. 45.

defense its claim that the District Court had never acquired jurisdiction over its person (R. 1, pp. 96-97).[5] It then set forth its compulsory counterclaim predicated upon Union's breach of the New York settlement agreement and covenant not to sue, alleging as part and parcel of that compulsory counterclaim the following in paragraph 18 thereof (R. 1, pp. 104-105):[6]

> "* * * that, to avoid a default in answering, the defendant herein has been compelled to file this counterclaim as a compulsory counterclaim under the Federal Rules of Civil Procedure; and that it is now filing the same herein without waiving or intending to waive the objections which it has heretofore raised and asserted, and has herein alleged, to the jurisdiction and venue of this court."

The answer was interposed on March 22, 1965. The application for leave to file a petition for a writ of prohibition was denied later that day, on March 22, 1965.

4. *Union's Motions for Judgment on the Complaint and to Dismiss the Counterclaim*

Thereafter, Union moved for judgment on the complaint, as well as for a dismissal of the compulsory counterclaim as insufficient in law, even before it filed its reply. Its motion to dismiss the compulsory counterclaim was denied. Its motion for judgment on the complaint was granted. A judgment in favor of Union against Dragor in the sum of $1,037,500. was made and entered by the District Court on

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[5] The defense set forth in Dragor's answer, that the District Court lacked jurisdiction *in personam,* was noted by this Court in its opinion upon the prior appeal at 361 Fed. (2d), p. 45.

[6] These allegations of the compulsory counterclaim were noted by this Court in its opinion upon the prior appeal, 361 Fed. (2d), p. 45, footnote 2.

June 1, 1965, the judgment which this Court reversed on April 7, 1966 upon the ground that the District Court never acquired and could not constitutionally exercise any jurisdiction over the person of this defendant.

5. *Union's Action in the Federal District of Connecticut*

Subsequent to the entry of the judgment for $1,037,500. and on or about June 29, 1965, Union brought an action in the United States District Court for the District of Connecticut against Jakob Isbrandtsen, a resident of the State of Connecticut and the guarantor under a guaranty executed and delivered in New York of Dragor's obligations upon the New York settlement agreement and non-negotiable promissory note issued thereunder. (R. 2, pp. 68; 76-82). In that action, Isbrandtsen filed an answer denying any liability to Union under his guarantee (R. 2, pp. 83-99), and, in addition thereto, under Rule 14(a) of the Federal Rules of Civil Procedure, a third party complaint against Dragor demanding that he be reimbursed by Dragor for any sum or sums for which he might be held liable to Union. (R. 2, pp. 100-101). Dragor thereupon filed its answer which contained, likewise under Rule 14(a), a denial of any liability to Isbrandtsen or Union and a cross claim against Union in which it set forth its claim for damages predicated upon Union's breach of the New York settlement agreement and covenant not to sue, the precise cause of action which it had been forced to set forth as a compulsory counterclaim in the Arizona suit. (R. 2, pp. 116-136).

Union then moved before the Arizona District Court, by a notice of motion, returnable on September 13, 1965, for an order "enjoining the defendant (Dragor) from proceeding, until further order of this Court, in civil action #11011 entitled 'Union Tank Car Company v. Jakob Is-

brandtsen, Defendant and Third-Party Plaintiff v. Dragor Shipping Corporation, Third-Party Defendant' which action is now pending in the District Court for the District of Connecticut." (R. 2, pp. 65-71; 159). Isbrandtsen thereupon moved in the Connecticut District Court, on October 15, 1965, for an order of that Court enjoining and restraining both Union and Dragor from proceeding with the prosecution of the compulsory counterclaim in this Arizona action (R. 2, p. 159).

6. *Dragor's Motion for Leave to Discontinue Its Compulsory Counterclaim Without Prejudice*

Faced, on the one hand, with a threatened injunction in the Arizona suit against the assertion of its defenses and the prosecution of its cross-claim in the Connecticut action, and, on the other hand, with an injunction by the Connecticut District Court against the prosecution of its compulsory counterclaim in the Arizona suit, Dragor thereupon moved in this action before the Arizona District Court for an order under Rule 41(a) and (c) of the Federal Rules of Civil Procedure discontinuing its "coerced" counterclaim in the Arizona suit without prejudice. (R. 2, pp. 146-165). It pleaded, in support of its application to discontinue the compulsory counterclaim without prejudice, that, were it successful in its then pending appeal to this Court, "all of the proceedings in this Court will be nullified *ab initio.*" (R. 2, p. 149). It argued additionally as follows (R. 2, pp. 161-163):

> "1. The set-off and counterclaim in this action suffers from *a jurisdictional taint which will invalidate all of the proceedings in this Court, if Dragor is successful in its appeal from this Court's rulings.* No such taint clouds the jurisdiction of the Connecticut District Court.

2. Jakob Isbrandtsen is not a party to this action and has never had an opportunity to be heard in his own defense by attorneys of his own choice and selection. He is a party to the Connecticut action. Consequently, in the Connecticut District Court, a forum chosen by the plaintiff itself, all of the necessary parties are before a single tribunal, which has unquestioned jurisdiction, power and authority to dispose in one action of all of the issues presented by all of the parties to the existing controversies.

3. Union is a defendant under Dragor's set-off and counterclaim in this action, the only affirmative pleading remaining before this Court. It is likewise a defendant to the cross-claim asserted by Dragor in the Connecticut action. No defendant has a right to determine in which of two tribunals he may be sued, particularly where he has himself invoked the jurisdiction of both and the jurisdiction of one has been continuously and vehemently protested by the other.

4. Finally, neither Isbrandtsen nor the issues between Union and Isbrandtsen and Isbrandtsen and Dragor are before this Court and can never be before this Court. All of the parties and all of the issues, including the issues between Union and Dragor under the counterclaim, are presently before the Connecticut Court which can, by a single adjudication in a single trial binding upon all of the parties thereto, resolve all of the existing controversies. In the language of the United States Supreme Court in *Kerotest Manufacturing Co.* v. *C-O Two Fire Equip. Co.*, 342 U. S. 180: *'The Chicago (in this case Connecticut) suit when adjudicated will bind all the parties in both cases. Why should there be two litigations where one will suffice? We can find no adequate reason.'"* (Italics ours)

Upon the argument for leave to discontinue, the District Court declared that, even if this Court should reverse the judgment of $1,037,500. which had been previously entered against Dragor upon the ground that the District Court never acquired any jurisdiction *in personam,* it intended, nevertheless, to proceed with a trial of the compulsory counterclaim which Dragor had been forced to file.

The District Court thereupon denied Dragor's motion for leave to discontinue without prejudice (R. 2, p. 232). As a result, Dragor became convinced that any further participation by it in the proceedings before the Arizona District Court might irreparably jeopardize its claim that the Arizona District Court never acquired jurisdiction over its person in this action. Consequently, upon the advice of counsel,[7] it refused to proceed any further (R. 2, pp. 204-206), confident that its position would be sustained upon appeal. On December 7, 1965, the District Court dismissed the compulsory counterclaim "for failure of defendant and

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[7] As this Court was advised upon Dragor's application for leave to file a writ of prohibition (Statement of Points and Authorities, pp. 11-12), Dragor's counsel were acutely aware of the fact that no definitive decision had been rendered by this Court in this area of the law. In their view, the District Court's insistence upon an immediate trial of the compulsory counterclaim upon the merits, no matter how this Court might rule upon the then pending appeal, in conjunction with the decision of the Fifth Circuit in *Haberman* v. *Equitable Life Assurance Society of the United States,* 224 Fed. (2d) 401 (1955), threatened the preservation of the constitutional objections upon which Dragor had so painstakingly insisted. In *Haberman,* the Fifth Circuit had ruled as follows, at p. 409:

> "That counterclaim was a compulsory counterclaim under Rule 13(a), Federal Rules of Civil Procedure, * * * Consequently, whether or not Equitable had the capacity to bring this action, *this court has and the court below had, jurisdiction, Haberman having allowed the action and counterclaim to go to final judgment on the merits.*" (Italics ours.)

Consequently, counsel were fearful that, if Dragor participated in a trial of its compulsory counterclaim upon the merits, it might thereby be deprived of its right thereafter to press its constitutional objections to the *in personam* jurisdiction of the District Court.

cross-claimant to prosecute the same . . ." (R. 2, p. 207).[8] Dragor thereupon promptly appealed to this Court from the aforesaid judgment.[9] (R. 2, p. 208).

Specification of Errors

1. This Court's judgment of April 7, 1966, conclusively and finally adjudicated the District Court's lack of jurisdiction over the person of Dragor. Consequently, the District Court erred in entering a judgment dismissing the compulsory counterclaim involuntarily filed by Dragor in its answer. The judgment is totally void and must be annulled.

2. The Arizona District Court erred in denying Dragor's motion for leave to discontinue its compulsory counterclaim without prejudice under Rule 41(a)(2) of the Federal Rules of Civil Procedure.

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[8] The District Court's dismissal of the compulsory counterclaim, and the then pending appeal from that judgment of dismissal, were noted by this Court in its opinion upon the prior appeal, 361 Fed. (2d), p. 45, footnote 4.

[9] The disposition of Union's motion in the Arizona District Court and Isbrandtsen's motion in the Connecticut District Court was as follows: (1) Union failed to press, and virtually withdrew, its motion for an injunction in the Arizona District Court; and (2) with appropriate regard for judicial propriety, Judge Zampano of the Connecticut Federal Court stayed all proceedings by all parties in the Connecticut action until all appeals from the decisions of the Arizona District Court were finally decided.

ARGUMENT

POINT I

This Court's judgment of April 7, 1966 conclusively established, as *res judicata*, the Arizona District Court's lack of jurisdiction over the person of Dragor in this action. Consequently, the judgment of the District Court dismissing the compulsory counterclaim which Dragor had been compelled to file is totally void and must be annulled.

"Judicial jurisdiction", declared this Court in *L. D. Reeder Contractors of Arizona* v. *Higgins Industries,* 265 Fed. (2d) 768, 771, is an indispensable prerequisite to the constitutional validity of juridical action.

This Court's judgment of reversal on April 7, 1966 constituted a final and definitive adjudication that the Arizona District Court never acquired, and could not lawfully exercise, any judicial jurisdiction over the person of Dragor in this lawsuit. Lacking a constitutional base, all of its orders, judgments and decrees were a total nullity. In the language of this Court in *L. D. Reeder, supra,* at p. 770, "Obviously, a lack of competence of the Court to hear the matter will prevent the entry of a valid judgment."

Had the District Court properly recognized its "lack of competence" and quashed the alleged service of process at the very threshhold of these proceedings, the matter would have been completely concluded. Had it permitted an interlocutory appeal under 28 USC §1292 (b), prior to compelling Dragor to file its answer and compulsory counterclaim, the matter would likewise have been concluded. In Union's own language, "a reversal of the court's order sustaining the service of process would terminate litigation . . ." (R. 1,

p. 76). The District Court's initial error, perpetuated thereafter, culminated in a second judgment which, as in the case of the first judgment, was totally void, without any constitutional, jurisdictional or due process foundation therefor whatsoever.

A. *This Court's Judgment of April 7, 1966 Has Conclusively Determined, as res judicata, the District Court's Lack of Jurisdiction Over the Person of Dragor in This Case*

On April 7, 1966, this Court reversed the judgment entered by the District Court on June 1, 1965 upon the ground that the District Court never acquired any jurisdiction over the person of Dragor.

From the very inception of these proceedings, Dragor has resolutely and steadfastly refused to acknowledge, accept or submit to the *in personam* jurisdiction of the Arizona District Court. The record of that continuous refusal, and Dragor's meticulous preservation of its constitutional objections to the *in personam* jurisdiction of the District Court under Rule 12 of the Federal Rules of Civil Procedure, are crystal clear. This Court's judgment of reversal, predicated squarely upon the ground that the Arizona District Court never acquired any jurisdiction over the person of Dragor, is *res judicata* upon this appeal. It constitutes a final, conclusive and binding determination that the Arizona District Court did not possess and never obtained any jurisdiction over the person of Dragor in this lawsuit. "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues." (*American Surety Co.* v. *Baldwin,* 287 U.S. 156, 166, 53 Sup. Ct. 98).

Every material fact, circumstance, principle of law and argument necessary to a resolution of that issue was before this Court upon the prior appeal. None of them, singly or

collectively, were ever deemed to constitute, even argumentatively, a submission by Dragor to the *in personam* jurisdiction of the Court below. Among those facts were the following:

1. Subsequent to the purported service of process, Dragor appeared specially to quash that service and dismiss the complaint upon the ground that the Arizona District Court could not constitutionally acquire thereby jurisdiction over the person of this defendant (361 Fed. (2d) 43 ,45).

2. Upon the denial of that motion, Dragor moved to modify the District Court's Order by adding recitals thereto which would permit an interlocutory review by this Court under 28 U. S. C. §1292 (b) (361 Fed. (2d) 43, 45).

3. After the District Court denied the motion to amend, Dragor moved in this Court for leave to file a petition for a writ of prohibition restraining the District Court from proceeding with the action in that Court. The application was denied (361 Fed. (2d) 43, 45).

4. Thereafter, Dragor was compelled to file an answer which reiterated its defense that the Arizona District Court did not possess jurisdiction over its person (361 Fed. (2d) 43, 45).

5. In its answer, Dragor was compelled to assert a compulsory counterclaim which alleged that Union had breached the New York settlement agreement and covenant not to sue. In setting forth its compulsory counterclaim, Dragor specifically stated that, to avoid a default in answering, it had been compelled to file the counterclaim as a compulsory counterclaim, and that it did so "without waiving or intending to waive the objections which it had theretofore raised and asserted, and had alleged in its answer . . . to the juris-

diction and venue of this court" (361 Fed. (2d) 43, 45, footnote 2).

6. Subsequent to the entry of the judgment upon the complaint, and for the reasons more specifically set forth above, Dragor moved for leave to discontinue its compulsory counterclaim without prejudice, alleging, as one of the grounds therefore, that the *in personam* jurisdiction of the District Court was the subject of an appeal to this court and that, were Dragor successful, "all of the proceedings in this court will be nullified *ab initio*" (R. 2, p. 149; Dragor's Reply Brief, Appeal No. 20416, pp. 18-19).

7. On December 7, 1965, the date specified by the District Court for the trial of the compulsory counterclaim, a judgment was entered dismissing the counterclaim for lack of prosecution. Dragor's appeal from the order granting such judgment was pending at the time that the first appeal in this cause was argued and decided (361 Fed. (2d) 43, 45, footnote 4).

It is impossible to conceive of a more adamant and continuously asserted objection to the jurisdiction of the District Court than that presented to this court by the record herein. It is equally impossible to conceive of a more meticulous preservation of those constitutional objections by a litigant than the steps taken by Dragor in this action under Rule 12 of the Federal Rules of Civil Procedure. In Moore's Federal Practice, Rules Pamphlet, Civil Rules—Official Forms, as amended 1966, the commentators declared of the current revisions to Rule 12:

> "Rule 12(b) has not changed the federal doctrine that where a defendant properly presents his defenses, on an appeal from an adverse judgment on the merits all the defenses raised by him, both matter in bar and

matter in abatement involving jurisdiction (cf. 28 USC §2105), are open to him. Thus, for example, if he has properly challenged lack of jurisdiction over his person by a motion under Rule 12(b) (2), and this motion is overruled by the district court, the defendant may plead to the merits and on appeal from a judgment for the plaintiff raise lack of jurisdiction over his (the defendant's) person as well as matter going to the merits, and if the defendant is sustained as to his matter in abatement, the judgment on the merits will be reversed with directions to dismiss the action. Paragraph 12.12."

The authorities are completely in accord with the foregoing principles. They include the very authorities which Union had successfully invoked when it had induced both this Court and the District Court to deny Dragor's protracted efforts to procure an interlocutory review of the District Court's refusal to quash the service of process before it was forced to file its compulsory counterclaim herein. In the very language employed by Union before this Court upon Dragor's motion for leave to file a writ of prohibition, "the authorities held *without exception* that the pleading of a compulsory, as distinguished from a permissive, counterclaim, constitutes no waiver of a previously asserted jurisdictional defense." Union contended at that time that "The pleading of a proposed compulsory counterclaim will not constitute a waiver of petitioner's personal jurisdiction objection" is "a question with respect to which there is *no conflict of authority.*"

Hasse v. *American Photograph Corporation,* 299 Fed. (2d) 666 (10th Circ., 1962);

North Branch Products, Inc. v. *Fisher,* 284 Fed. (2d) 611 (Ct. of Appeals, D. C., 1960);

Davis v. *Ensign-Bickford Co.,* 139 Fed. (2d) 624 (8th Circ., 1944);

Blank v. *Bitker,* 135 Fed. (2d) 962 (7th Circ., 1943);

Sadler v. *Penn. Refining Co.,* 33 Fed. Supp. 414 (1940);

Beaunit Mills, Inc. v. *Industrias Reunidas F. Matarazzo,* 23 F. R. D. 654, 657 (S. D. N. Y. 1959);

Barron & Holtzoff, Federal Practice and Procedure, Vol. 1A, §370.2, p. 535).

In accordance with the foregoing decisions, it is indisputably clear that, by its decision of April 7, 1966, this Court had unequivocally ruled that the Arizona District Court did not possess any jurisdiction over the person of Dragor, that it lacked any constitutional power or competence to enter a valid judgment in this cause, and that its initial judgment in favor of Union was totally void.

> "An adjudication bars future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised. . . ." (*Angel* v. *Bullington,* 330 U. S. 183, 186, 187; 67 Sup. Ct. 657, 1947).

It follows then, as night the day, that the Arizona District Court's second judgment dismissing Dragor's compulsory counterclaim for want of prosecution is equally as void as its first judgment and must likewise be annulled upon this appeal.

B. ***The District Court's Judgment Dismissing Dragor's Compulsory Counterclaim is Void.***

It is fundamental learning that the judgment of a Court which lacks jurisdiction *in personam* is a total nullity. The principle is one of ancient lineage. It was

universally applied in Anglo-American law before the adoption of the Fourteenth Amendment to the Constitution.[10] Under that amendment, jurisdiction *in personam* where a personal judgment is sought is an indispensible constitutional requisite of due process (*Pennoyer* v. *Neff*, 95 U. S. 714).

As the Supreme Court has recently declared in *Hanson* v. *Denckla*, 357 U. S. 235 at 249:

> "Prior to the Fourteenth Amendment an exercise of jurisdiction over persons or property outside the forum State was thought to be an absolute nullity, but the matter remained a question of state law over which this Court exercised no authority. With the adoption of that Amendment, any judgment purporting to bind the person of a defendant over whom the court had not acquired *in personam* jurisdiction *was void within the State as well as without, Pennoyer* v. *Neff*, 95 U. S. 714." (Italics ours.)

In *McDonald* v. *Mabee*, 243 U. S. 90, Justice Holmes stated of a judgment entered without jurisdiction *in personam*:

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[10] That the predicate of jurisdiction *in personam* was absolutely essential to the validity of any personal judgment under Anglo-American law is graphically noted by Judge Sobeloff, "Jurisdiction of State Courts over Non-Residents in our Federal System", 43 Cornell Law Quarterly, 196 at page 198:

> "All within physical reach of this power were subject thereto, and logically, therefore, action affecting persons beyond the court's geographical area of control was a nullity. These conceptions are epitomized by the famous English case in which the Court of the King's Bench refused to recognize a personal judgment rendered by the island court of Tobago against a defendant who had never been there. Wrote Lord Ellenborough the now famous words: "Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?"

> "Whatever may be the rule with regard to decrees concerning status or its incidents, *Haddock* v. *Haddock,* 201 U. S. 562, 569, 632, an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State as it is outside of it. 201 U. S. 567, 568. * * * The personal judgment was not merely voidable, as was assumed in the slightly different case of Henderson v. Staniford, 105 Massachusetts, 504, *but was void.*" (Italics ours.)

Again, in *Foster-Milburn Co.* v. *Knight,* 181 Fed. (2d) 949 (2d Circ.), Judge Learned Hand declared at p. 952:

> "It is hornbook law that transitory actions must begin with personal service upon the defendant and that, when they do not, *the judgment is a nullity.*" (Italics ours.)

More recently, in *Vanderbilt* v. *Vanderbilt,* 354 U. S. 416, Justice Black declared at p. 418:

> "It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant."

Citing *Vanderbilt* v. *Vanderbilt, supra,* the court in *Hanson* v. *Denckla,* 357 U. S. 235 underscored the fact, at p. 251, that the constitutional requirement of jurisdiction *in personam* is "a consequence of territorial limitations on the power of the respective States." Indisputably, then, "if, in fact, there were no service, *the proceedings . . . were void from the very outset.*" (*Williams* v. *Capital Transit Co.,* 215 Fed. (2d) 487, 490, Ct. App. D. C. 1954).

The United States Supreme Court necessarily held, therefore, in *Kelleam* v. *Maryland Casualty Company of*

Baltimore, 312 U. S. 377 that, the complaint having been dismissed for want of jurisdiction, "no jurisdiction would remain for any grant of relief under the cross-petition" (p. 382). In *Manufacturers Casualty Insurance Company v. Arapahoe Drilling Co.,* 267 Fed. (2d) 5, the Court of Appeals for the 10th Circuit was presented with a set of facts substantially resembling those of the instant case.

In that case, one, Campbell, commenced an action for damages against the Arapahoe Drilling Company. The Manufacturers Casualty Insurance Company entered the case as an intervenor plaintiff because of subrogation rights arising through the payment of workmen's compensation benefits to Campbell. The defendant asserted a counterclaim to the insurance company's complaint alleging that it was an additional insured under a policy issued by the insurance company to Campbell's employer and covering the accident giving rise to the main suit.

The trial court granted a summary judgment dismissing the counterclaim. It then proceeded to a trial of the principal case and discovered, *after the counterclaim had been dismissed upon the merits,* that diversity jurisdiction was lacking for the principal suit. The trial court thereupon dismissed the principal suit for lack of jurisdiction and then proceeded to vacate its prior summary judgment dismissing the counterclaim. The insurance company appealed from a vacatur of the summary judgment.

In affirming, the Circuit Court ruled that the counterclaim could not survive the jurisdictional failure of the complaint. *A fortiorari,* where there has been, from the very outset, a total absence of jurisdiction *in personam,* a compulsory counterclaim which a defendant has been coerced into filing cannot, of course, bestow upon the Court which erroneously exerted the compulsion any jurisdiction

over the person of the defendant for any purpose whatsoever.

C. *A Void Judgment, Entered After an Erroneous Refusal to Quash the Service of Process, Can Only Be Annulled Upon a Direct Appeal to an Appropriate Appellate Tribunal.*

Though the judgment of the District Court dismissing Dragor's compulsory counterclaim herein is totally void, it cannot be ignored. It will not be possible for Dragor to attack that judgment collaterally in any other proceeding or any other jurisdiction. To avoid being prejudiced thereby in any future litigation, it was absolutely essential that Dragor prosecute an appeal from that judgment to this court for a corrective decree expunging it from the record.

The precise issue was presented to the Supreme Court in *Baldwin* v. *Iowa State Traveling Men's Association,* 283 U. S. 522. In that case, as in this, in a suit commenced in the Federal District Court for Western Missouri, the defendant appeared specially and moved to quash and dismiss for want of proper service. The motion to dismiss was overruled with leave to plead. No pleading was filed, the cause proceeded and a judgment was entered for the amount claimed. The defendant did not move to set aside the judgment or sue out a writ of error.

Thereafter, an action upon that judgment was commenced in the Federal District Court for Iowa. The defendant claimed, as a defense to the second suit, that it had never been served with process in the first action. The plaintiff contended that the defense constituted a collateral attack upon the judgment which was not permissible. The courts below upheld the defendant's contention that the judgment was void for want of personal jurisdiction and

dismissed the action. In sustaining the plaintiff's claim that the judgment of the Iowa District Court, even if void for want of personal jurisdiction, could not be collaterally attacked in the subsequent action, the Supreme Court declared (pp. 524-525):

> "The substantial matter for determination is whether the judgment amounts to *res judicata* on the question of the jurisdiction of the court which rendered it over the person of the respondent. It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. That fact would be important upon appeal from the judgment, and would save the question of the propriety of the court's decision on the matter even though after the motion had been overruled the respondent had proceeded, subject to a reserved objection and exception, to a trial on the merits. (Citing cases.) The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. (Citing cases.) It had also the right to appeal from the decision of the Missouri District Court, as is shown by *Harkness* v. *Hyde, supra,* and the other authorities cited. It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.
>
> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall

be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

Semble:

Stoll v. *Gottlieb,* 305 U. S. 165;
Allen v. *United States Fidelity & Guaranty Co.,* 342 Fed. (2d) 951 (9th Cir., 1965).

In accordance with the foregoing decisions, Dragor must apply to this Court for a corrective decree expunging the void judgment of the District Court dismissing Dragor's compulsory counterclaim (*U. S.* v. *Milana,* 148 Fed. Supp. 153). The claims of each of these parties against the other will be litigated in a competent forum at a future date, undoubtedly in the action heretofore commenced by Union against Isbrandtsen in the Federal District Court of Connecticut where all of the parties have asserted their claims and cross-claims. Dragor will be irreparably injured if the District Court's judgment upon the compulsory counterclaim is not annulled and Union is enabled to argue, at such later date, that the void judgment of dismissal has forever foreclosed Dragor from procuring a determination of its cause upon the merits.

D. *The District Court Erred in Denying Dragor's Motion for Leave to Discontinue Its Compulsory Counterclaim Without Prejudice.*

Under the circumstances presented by the instant case, it is plain that the District Court erred in denying Dragor's

motion for leave to discontinue its compulsory counterclaim without prejudice. After Union's motion for a judgment upon the complaint had been granted, there was no conceivable reason why Dragor should have been forced to continue the compulsory counterclaim which it had been compelled to file over its strenuous objections, particularly where, as here, Union had instituted its action against Isbrandtsen in the Federal District Court of Connecticut and all of the issues presented by the compulsory counterclaim would and could be adjudicated in that suit by a court whose power and competence to do so were unchallenged.

An order of this Court permitting Dragor to discontinue its compulsory counterclaim without prejudice would eliminate completely the deleterious consequences of Union's abortive attempt to invoke the non-existent jurisdiction of the Arizona District Court. It would obviate the certainty that Dragor would be irreparably prejudiced, in another forum, by the claim which Union would there advance that Dragor was forever barred and foreclosed from asserting, as a cross-claim against Union, the cause of action which it had involuntarily set forth in the compulsory counterclaim and which the Arizona District Court itself had upheld as valid and subsisting.

CONCLUSION

The authors of Rules 12 and 13 of the Federal Rules of Civil Procedure did not intend to create thereby a hidden trap whereby a non-resident, who is being "hauled across the country to defend itself" before a court without jurisdiction over its person (361 Fed. (2d) 43, 49), would be compelled either to forego its jurisdictional objections or waive forever its compulsory counterclaim. Those Rules

were not designed to impale a non-resident upon the horns of so insoluble and cruel a dilemma. To sanction so inequitable a result would constitute an intolerable reproach to the administration of justice. The initial error of the Arizona District Court in refusing to sustain Dragor's constitutional rights cannot possibly be utilized as a means of destroying those rights.

The judgment of the court below must be reversed and the record purged by permitting Dragor to discontinue its "coerced" compulsory counterclaim without prejudice to its constitutional right to a trial thereof upon the merits before a court competent to adjudicate the issues. Any other result would subvert the beneficent purposes of the Federal Rules of Civil Procedure.

It is respectfully submitted that the judgment appealed from be reversed and Dragor be permitted to discontinue its compulsory counterclaim without prejudice.

Respectfully submitted,

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Certificate of Compliance

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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